SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 446

MICHAEL GLUS, PETITIONER

vs.

BROOKLYN EASTERN DISTRICT TERMINAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in the U. S. Court of Appeals for the Second Circuit	A	1
Appendix to appellant's brief, consisting of proceedings in the U. S. District Court for the Southern District of New York	A	1
Relevant paragraph of plaintiff's complaint	1	1
Defendant's notice of motion to dismiss plaintiff's complaint	2	1
Opinion, Bryan, J.	3	2
Order appealed from	11	7
Statement under Rule 15(b)	12	7
Per Curiam opinion	13	7
Judgment	15	9
Clerk's certificate (omitted in printing)	17	10
Order allowing certiorari	18	10

A In the United States Circuit Court of Appeals For The Second Circuit

MICHAEL GLUS, PLAINTIFF-APPELLANT

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Appendix to Appellant's brief

Filed December 27, 1957

[File endorsement omitted.]

1 In United States District Court for the Southern District of New York

Relevant paragraph of plaintiff's complaint

9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time.

2 In the United States District Court Southern District Civil Action #120–77

Defendant's notice of motion to dismiss plaintiff's complaint

May 17, 1957

[Title omitted.]

Please take notice that upon the complaint herein and the affidavit of Jeremiah G. Mahony, duly verified the 17th day of May, 1957, the undersigned will move this Court at a Stated Term for the hearing of motions, Room 506 to be held at the Federal Courthouse, Foley Square, New York, New York on the 4th day of June, 1957, for an order under Rule 107, subdivision 5, of the Rules of Civil Practice, dismissing the complaint on the ground that it is barred by the Statute of Limitation, together with the costs and disbursements of this action.

Please take further notice that answering affidavits are to be served at least five days prior to the return day of the motion.

THOMAS P. CURTIN,
Attorney for Defendant,
Office and P. O. Address,
116 John Street, New York, New York.

3 In the United States District Court, Southern District of New York

#23782

Civil 120–77

MICHAEL GLUS, PLAINTIFF

against

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT

Appearances: Seymour Schwartz, Esq., Attorney for Plaintiff; Thomas P. Curtin, Esq., Attorney for Defendant.

Opinion

September 25, 1957

BRYAN, *District Judge:*

This is an action under the Federal Employers' Liability Act, 45 U. S. C. Section 51 et seq., to recover damages for an industrial disease allegedly contracted by plaintiff in 1952 as a result of working under unsafe conditions while employed by the defendant.

Defendant now moves to dismiss the complaint under Rule 12 (b) (6), F. R. C. P., on the ground that it appears from the face of the complaint that the action has not been timely brought.

The statute of limitations may be raised on a mo-
4 tion to dismiss the complaint where it appears from the face of the complaint that the action was not commenced within the statutory period. Kincheloe v. Farmer, 7 Cir., 214 F. 2d 604; Eastern Pipe Line Co. v. Parish, 10 Cir., 168 F. 2d 238; Berry v. Chrysler Corp., 6 Cir., 150 F. 2d 1002; Drabkin v. Gibbs & Hill, D. C. S. D. N. Y., 74 F. Supp. 758, 762; Sinclair v. United States Gypsum Co., D. C. W. D. N. Y., 75 F. Supp. 439, 442. Plaintiff's contention to the contrary is mistaken.

Section 6 of the Federal Employers' Liability Act, 45 U. S. C. Section 56, provides:

"No action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

The present action was commenced on May 2, 1957, concededly more than three years after the cause of action accrued. However, the complaint alleges in paragraph 9:

"9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time."

Plaintiff contends that if these allegations are taken to be true, as they must be on this motion, the three year statute of limitations in the Act has been tolled by the defendant's fraud or misrepresentations.

The question presented is whether a cause of action under the Federal Employers' Liability Act is irretrievably lost upon the expiration of the three year period of limitation in Section 6 of the Act, or whether the right which the plaintiff asserts remains alive if plaintiff's failure to sue within three years is brought about by defendant's fraud.

The cases are in sharp conflict on this question.

There has long been a distinction drawn between ordinary statutes of limitation and time limitations prescribed in statutes which create the liability and confer the right of action. Where the time limitation is an integral part of the statute creating the substantive right, the time for commencing the action prescribed in the statute is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitation. Pollen v. Ford Instrument Co., 2 Cir., 108 F. 2d 762; Bell v. Wabash Ry. Co., 8 Cir., 58 F. 2d 569, 571; Sgambati v. United States, 2 Cir., 172 F. 2d 297, certiorari denied, 337 U. S. 938; United States ex rel. Nitkey v. Dawes, 7 Cir., 151 F. 2d 639, certiorari denied, 327 U. S. 788; Larson v. Port of New York Authority, D. C. S. D. N. Y., 17 F. R. D. 298, 300.

One line of cases holds that the Federal Employers' Liability Act is such a statute creating a substantive right, and that Section 6 is a "built in" statute of limitations. The filing of the complaint within three years after the cause of action accrued is therefore held to be a condition precedent to recovery, the cause of action is extinguished after the running of that period, and the period cannot be extended by the claimant's inability to sue by reason of infancy

or insanity or by delay caused by defendant's fraud or concealment. Damiano v. Pennsylvania R. Co., 3 Cir., 161 F. 2d 534, certiorari denied, 332 U. S. 762; American R. Co. of Porto Rico v. Coronas, 1 Cir., 230 F. 545, 546; Bell v. Wabash Ry. Co., supra; Matter of Ahern v. South Buffalo Ry. Co., 303 N. Y. 545, 568, aff'd, 344 U. S. 367. Cf. Central Vermont Ry. v. White, 238 U. S. 507, 511.

This view was expressed by the Court of Appeals of this Circuit in Osbourne v. United States, 2 Cir., 164 F. 2d 767, 768, as follows:

"Generally, where a statute creates a cause of action which was unknown at common law, a period of limitation set up in the same statute is regarded as a matter of substance, limiting the right as well as the remedy. Filing a complaint within the prescribed period is a condition precedent to recovery, and the cause of action is extinguished after the running of the period. The general rule, developed chiefly with respect to the Federal Employers' Liability Act, §§ 1–10, 45 U. S. C. A. §§ 51–60, has been applied also to the period of limitations in the Jones Act, which incorporates the period in the Employers' Liability Act, and to the Suits in Admiralty Act. The practical results of the application of this rule have been * * * that the period of limitation under any of these Acts will not be extended, as it would be in the case of an ordinary statute of limitations, by a claimant's disability to sue because of infancy or insanity or by a delay occasioned by the fraud of the defendant * * *."

However, the language just quoted is not a holding of the court but is dictum. In Osbourne, the plaintiff sued to recover for injuries suffered prior to December 8, 1941, through the alleged negligence of the owners of the vessel on which he was employed as a crew member. On December 8, 1941 he and the rest of the crew were interned by the enemy. He returned to this country in October 1945 and commenced suit on July 31, 1946. The respondent excepted to the libel on the ground that it had not been filed within the two year period of limitations permitted under the Suits in Admiralty Act, 46 U. S. C. Section 745, or the three year period under the Jones Act, 46 U. S. C. Section 688. The court held that since the plaintiff had been denied access to the courts during the period of his internment, both his rights and his remedies had been suspended during that period, and that the statute of limitations was tolled dur-

ing the time that the courts were thus inaccessible to him, whether the statute was substantive or procedural.[1]

8 In Sgambati v. United States, supra, the Court of Appeals, on the basis of its language in Osbourne which has been quoted, held expressly that infancy did not toll the "built in" statutes of limitations contained in the Suits in Admiralty Act and the Public Vessels Act, stating:

"The unusual ground for exception to the statutory period we found to exist in the Osbourne case (i. e., impossibility of access to the courts within the period) was absent here."

The Sgambati case is in accord with the weight of authority Damiano v. Pennsylvania R. Co., supra; Pollen v. Ford Instrument Co., supra; United States ex rel. Nitkey v. Dawes, supra; Bell v. Wabash Ry. Co., supra. *Cf.* The Harrisburg, 119 U. S. 199, 214; Central Vermont Ry. v. White, supra. It lays down the rule in this circuit that the "built in" statute of limitation in the Federal Employers' Liability Act, the Jones Act, the Suits in Admiralty Act, and similar statutes, will not be extended by disability to sue because of infancy or insanity or by delay occasioned by the defendant's fraud.

It may be noted, however, that there are well-reasoned cases to the contrary. Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F. 2d 253, certiorari denied, 339 U. S. 919, 190 F. 2d 935, 202 F. 2d 84; Toran v. New York, N. H. & H. R. Co., D. C. D. Mass., 108 F. Supp. 564; Fravel v. Pennsylvania R. Co., D. C. D. Md., 104 F. Supp. 84. These cases hold that

9 where a plaintiff in an action under the Federal Employers' Liability Act has been fraudulently induced not to bring his action within the three year period by means of misrepresentations of fact made by the defendant, the statute is tolled. It is reasoned that (1) the Federal Employers' Liability Act did not create a new cause of action unknown at common law, but one closely related to the common law action of an employee against his negligent employer; (2) that the probable purpose of the time limitation in that Act was not to expunge plaintiff's rights absolutely after the expiration of a three year period, but rather to have one uniform

[1] Other cases tolling "built in" statutes of limitations on the theory that war conditions made the courts completely unavailable to plaintiffs during the limitation period, are Borovitz v American Hard Rubber Co., D. C. N. D. Ohio, 287 F. 368; Frabutt v. New York, Chicago & St. Louis R. Co., D. C. W. D. Pa., 84 F. Supp. 460.

statutory period of limitation throughout the country; that the Act expressly forbids any "device whatsoever, purpose or intent of which shall be to enable any common c rier to exempt itself from any liability", 45 U. S. C. Sect 55, and that fraudulent representations by the carrier resu ing in postponement of commencement of the action beyo the three year period of limitation constitute such a devi (4) that the wording of the limitation provisions in the A is not as imperative as in other acts where Congress sought merely to bar the remedy but to destroy the liability; and t (5) since the policy of the Act is to give employees broa rights than in common law, it would be anomalous to hold Federal law less favorable to a defrauded employee than common law.

The reasoning of these cases is not unpersuasive. I I feel that I am bound by the decisions of the Court
10 Appeals of this Circuit on the subject which are su ported by the weight of authority. I therefore h that plaintiff's failure to bring his action within the three y period prescribed by the statute bars him from recovery a that the period of time within which suit must be broug was not extended by the alleged fraud or misrepresentatio of the defendant.

This determination makes it unnecessary to pass on t further question of whether, assuming the statute could tolled by fraud or misrepresentation, the allegations in pa graph 9 of the complaint here would be sufficient, if esta lished, to toll it. Cf. Hilliard v. Pennsylvania R. Co., 6 C 73 F. 2d 473, 476.

The motion to dismiss is granted. Since there is no w in which the defect contained in the complaint could remedied by amendment, the complaint is dismissed witho leave to plead over. Larson v. Port of New York Authori supra.

(S) FREDERICK V. P. BRYAN,
U. S. D. J.

11 In United States District Court for the Southern District of New York

Order appealed from

September 25, 1957

The motion to dismiss is granted. Since there is no way in which the defect contained in the complaint could be remedied by amendment, the complaint is dismissed without leave to plead over. Larson v. Port of New York Authority, supra.

(S) FREDERICK V. P. BRYAN,
U. S. D. J.

12 In United States Court of Appeals for the Second Circuit

Statement Under Rule 15 (b)

Suit was instituted under the Federal Employers' Liability Act (Title 45, United States Code, Section 51 et seq.) on May 2, 1957. By motion dated May 17, 1957, defendant moved to dismiss the complaint on the ground that the action was barred by the statute of limitations. In an opinion and order dated September 25, 1957, Bryan, D. J., granted the motion to dismiss without leave to plead over.

By motion dated October 8, 1957, plaintiff moved for leave to appeal in Forma Pauperis. The motion was granted on October 18, 1957, by Ryan, D. J. On October 21, 1957, plaintiff filed Notice of Appeal.

13 In the United States Court of Appeals for the Second Circuit

No. 248. October Term, 1957

Argued March 13, 1958

Docket No. 24910

MICHAEL GLUS, PLAINTIFF-APPELLANT

v.

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Before: CLARK, Chief Judge, HINCKS, Circuit Judge, and BRENNAN, District Judge.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FREDERICK V. P. BRYAN, JUDGE

Plaintiff appeals from the dismissal of his action under the Federal Employers' Liability Act, 45 U. S. C. §§ 51 et seq., as barred by the statute of limitations. D. C. S. D. N. Y., 154 F. Supp. 863.

Seymour Schwartz, New York City, for plaintiff-appellant.
Thomas P. Cunin, New York City, for defendant-appellee.

14 *Per curiam opinion*

April 7, 1958

On May 2, 1957, the plaintiff brought suit under the Federal Employers' Liability Act, 45 U. S. C. §§ 51 et seq., to recover damages for an industrial disease allegedly contracted by him in 1952 as a result of working for defendant under unsafe conditions. In granting the defendant's motion to dismiss, Judge Bryan wrote a cogent opinion, D. C. S. D. N. Y., 154 F. Supp. 863, pointing out that, while there were decisions the other way, this Court was committed to the majority view that a period of limitation, "built in" the statute as is the three-year bar here, 45 U. S. C. § 56, could not be tolled by the defendant's fraud or misrepresentations. See the opinions of the late Judge Frank in Osbourne v. United States, 2 Cir., 164 F. 2d 767, and Sgambati v. United States, 2 Cir., 172 F. 2d 297, certiorari denied 337 U. S. 938. For the reasons well stated by Judge Bryan, we think we should not attempt to retrace our footsteps now, but may well await resolution of the conflict by the Supreme Court.

We are the more content to follow this course because the barrenness of the allegations here suggests a doubt as to any real fraud. Notwithstanding the explicit mandate of F. R. 9 (b) that in all avertments of fraud or mistake "the circumstances constituting fraud or mistake shall be stated with particularity," the plaintiff says only that "subsequent thereto"—the accruing of the cause—"defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time." This could be merely an unintent-

tional misstatement or expression of opinion on a matter of law. It lacks the equitable appeal of circumstances disclosed in decisions or discussions reaching the opposite conclusion. The order of dismissal is affirmed.

15 In the United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge; Hon. Carroll C. Hincks, Circuit Judge; Hon. Stephen W. Brennan, District Judge.

MICHAEL GLUS, PLAINTIFF-APPELLANT

v.

BROOKLYN EASTERN DISTRICT TERMINAL, DEFENDANT-APPELLEE

Judgment

April 7, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

16 [File endorsement omitted.]

17 [Clerk's certificate to foregoing transcript omitted in printing.]

18 Supreme Court of the United States

No. 81 Misc., October Term, 1958

MICHAEL GLUS, PETITIONER

vs.

BROOKLYN EASTERN DISTRICT TERMINAL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Order allowing certiorari

October 13, 1958

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 446 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1958

LIBRARY
SUPREME COURT, U. S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

—against—

BROOKLYN EASTERN DISTRICT TERMINAL,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

JOHN J. SEFFERN
c/o Seymour Schwartz
Attorney for Petitioner
253 Broadway
New York 7, New York

DAVID SABLE, Esq.
Of Counsel
253 Broadway
New York 7, New York

INDEX TO BRIEF

SUBJECT INDEX

	Page
PETITIONER'S BRIEF	
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented for Review	3
Statement of Case	3
Condensation of the Argument	5
POINT ONE	
Legal Analysis and Sound Public Policy Dictate That Fraud or Misrepresentation Tolls the Statute of Limitations in a Federal Employers' Liability Act Action	6
POINT TWO	
The Question of Whether the Representations of Defendant's Foreman, General Superintendent and Company Claim Agent to Plaintiff Were Sufficient to Toll the Statute of Limitations Is One of Fact To Be Determined at Trial	12
CONCLUSION	
Judgment for Defendant on the Pleadings Should Be Reversed and the Plaintiff Should Be Permitted a Trial on the Merits Including the Issue of Fraud or Misrepresentation	13

TABLE OF CASES

Bailey v. *Glover*, 21 Wall (U.S.) 342, 22 L.Ed. 636	9
Bell v. *Wabash Ry. Co.*, 58 F.2d 569	10
Bergeron v. *Mansour*, 152 F.2d 27	7
Damiano v. *Pennsylvania R. Co.*, 161 F.2d 534, Cert. den. 339 U.S. 919, 94 L.Ed. 1343, 70 S.C. 621	10
Exploration Co. v. *United States*, 247 U.S. 435, 62 L.Ed. 1200, 38 S.Ct. 571	9

Page

Fravel v. *Pennsylvania R. Co.*, 104 F.Supp. 64 11
Holmberg v. *Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 8
Osbourne v. *United States*, 164 F.2d 767 .... 9, 10
Rohner v. *Union Pacific Railroad Company*, 225 F.2d 272 10
Scarborough v. *Atlantic Coast Line R. Co.*, 178 F.2d 253, Cert. den. 339 U.S. 919, 94 L.Ed. 1343, 70 S.C. 621 10
Scarborough v. *Atlantic Coastline R. Co.*, 202 F.2d 84 12
Sherwood v. *Sutton*, 5 Mason 143, Fed. Cas. No. 12,782 9
Tora v. *New York, N.H.&H.R. Co.*, 108 F.Supp. 564 6

STATUTES CITED

45 U.S.C. 55 2
45 U.S.C. 56 .... 2, 6
Federal Rules of Civil Procedure Rule 9(b) 3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

—against—

BROOKLYN EASTERN DISTRICT TERMINAL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

Opinions Below

The opinion of FREDERICK VAN PELT BRYAN, Judge of the United States District Court for the Southern District of New York, is reported at 154 F.Supp. 863.

The *Per Curiam* opinion of the United States Court of Appeals for the Second Circuit is reported at 253 F.2d 957.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The time factors upon which such jurisdiction rests is set forth under 28 U.S.C. Sec. 2101(c).

Statutes Involved

45 U.S.C. 56

"No action shall be maintained under the chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

45 U.S.C. 55

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

Federal Rules of Civil Procedure Rule 9(b)

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Questions Presented for Review

1. Whether a cause of action under the Federal Employers' Liability Act, 45 U.S.C., Section 51, *et seq.*, is forever lost upon the expiration of the three-year period of limitations, or whether the right remains alive if Plaintiff's failure to sue within three years is brought about by Defendant's fraud or misrepresentation upon which Plaintiff relied.

2. Whether 45 U.S.C. Section 55, estops Defendant railroad from raising the defense of the statute of limitations where Plaintiff's delay in instituting suit is brought about by Defendant's fraud or misrepresentation upon which Plaintiff relied.

3. If fraud or misrepresentation tolls the statute of limitations in action under the Federal Employers' Liability Act, then whether Plaintiff's complaint adequately sets forth such a cause of action consistent with the Federal Rules of Civil Procedure 9(b), or whether Plaintiff need amend his complaint.

Statement of Case

Petitioner, Michael Glus, started employment with respondent Brooklyn Eastern District Terminal, in July, 1946. He was assigned almost exclusively to unloading bags of

flour from freight cars. The flour came in various sizes covered with bags of paper, cloth or burlap. As a result of this unloading activity there was always a considerable amount of flour dust in and about the freight cars caused by torn bags, seepage, and faulty packaging. No safety masks or protective devices were provided to employees who carried out these unloading duties in the area of the flour dust.

In July, 1951, petitioner Glus noticed that the flour dust was causing him to continually choke while working. It became difficult for him to breathe and his appetite fell off. He reported his condition to his foreman and arrangements were made for him to see a company doctor. After examining Glus the company doctor prescribed light duty. However, the doctor's advice was not followed by the Company and he continued to be assigned his regular duty of unloading flour.

During this period—1951 and 1952—at various times, his foreman, general superintendent, and the company claim agent advised him that his condition was not serious and that even if it were, he had seven years within which to bring suit against his employer, the Railroad.

Glus' symptoms steadily worsened. He was unable to continue working, and in July, 1952, he was forced to seek welfare assistance from the City of New York. In the same month he was examined at Greenpoint Hospital in Brooklyn, New York City, and then and there for the first time was told that he was suffering from a serious case of bronchial asthma as a result of his work.

Glus was last able to work for Brooklyn Eastern District Terminal on January 9, 1953. Thereafter, on March 9, 1953, he began work as a warehouseman for Norcross, Inc., a greeting card firm, where he is employed today. The atmos-

phere at his present job is clean and he does the light work as best he can except for regular heavy attacks of bronchial asthma.

Relying on the statements made by his foreman, superintendent, and the company claim agent, Glus withheld suit. Finally, in January, 1957, he was hospitalized at Roosevelt Hospital in New York City, for nine days following the most serious attack—a near fatal flareup of bronchial asthma. Since that time he has continued to attend regularly at Roosevelt Hospital for injections and treatment. On April 23, 1957, for the first time, Glus sought the advice of counsel and the within suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, was instituted nine days later in the United States District Court for the Southern District of New York, on May 2, 1957.

Condensation of the Argument

1. Legal analysis and sound public policy dictate that fraud or misrepresentation should toll the statute of limitations in a Federal Employers' Liability Act action.

2. Such a rule would merely place injured railroad employees in the same position that they were in prior to the passage of the Federal Employers' Liability Act so far as being permitted to raise equitable estoppel to the defense of the statute of limitations.

3. The purpose of the Federal Employers' Liability Act of avoiding a multiplicity of different state statutory periods would not be affected by permitting an equitable estoppel exception to the uniform three-year statute of limitations.

4. Whether there was fraud or misrepresentation sufficient to toll the statute of limitations in the instant action is a question of fact to be determined at trial.

5. Judgment for Defendant should be reversed and Plaintiff permitted a determination of the issues at trial.

POINT ONE

Legal Analysis and Sound Public Policy Dictate That Fraud or Misrepresentation Tolls the Statute of Limitations in a Federal Employers' Liability Act Action.

In *Tora* v. *New York, N.H.&H.R. Co.*, S.D.C.D. Mass., 108 F.Supp. 564, Plaintiff, a railroad employee, sustained an injury in August, 1947. His complaint was filed in March, 1952, after the statute of limitations had expired. The Defendant moved for summary judgment on the ground that the action had not been timely brought. Plaintiff replied that he had been fraudulently induced not to bring his action within the three-year statute of limitations by reason of false representations of fact made by Defendant. Wyzanski, *D.J.*, in holding for Plaintiff analyzed the reasons to support such a view:

> "1. The words of the statute do not give a plain command . . . Congress did not use the familiar formula which has been repeatedly held not merely to bar the remedy, but also to destroy the liability."

Section 6 of the Federal Employers' Liability Act, 45 U.S.C. Section 56 provides:

> "2. The broad policy of the Federal Employers' Liability Act is to create for a railroad employee injured through his employer's negligence, a cause of action under Federal Law which would be at least as generous as the typical state common law cause of action, available to other types of employees . . . It would there-

fore, be anomalous if the Federal Law was less favorable than the State Law to a defrauded employee. Yet it is clear under State Law that limitations of negligence actions are usually construed as subject to an exception benefitting a defrauded plaintiff. The defendant is, as the cases say, 'estopped from raising the defense of the statute of limitations, *Bergeron* v. *Mansour*, 1 Cir., 152 F.2d 27.'"

"3. Any contract or device whatsoever (presumably including a fraudulent representation), the purpose of intent of which shall be to enable any common carrier to exempt itself from any liability (is forbidden by the Act) 45 U.S.C. Section 55. And that and other provisions of the Act have been interpreted as precluding carriers from benefitting from releases they secured from deceived or overreached employees. (citing cases) A Congress which refused to allow a railroad employee to lose his right as a result of a fraudulently procured release, presumably did not expect a railroad employee to lose his right as a result of a fraudulently procured release, presumably did not expect a railroad employee to lose his right as a result of a fraudulently induced delay in bringing suit."

"4. . . . Purpose of Federal Employers' Liability Act statute of limitations was to avoid a multiplicity of different state statutory periods. This is not adversely affected by recognizing, also on a rational basis, the customary equitable estoppel exception to periods of limitation governing personal injury actions."

Judge Wyzanski added that broad statements regarding whether the statute of limitations affected right or the remedy are not made where fraud is alleged but are made where a novel cause of action is involved. The cause of action under the Federal Employers' Liability Act is closely

akin to the familiar common law action of an employee against his negligent employer—an action where fraud tolls the statute.

Defendant's motion to dismiss was denied.

One purpose in setting forth a time limitation under the Act is to have one uniform statutory period of limitation to avoid having each state separately applying its own different limitations. This purpose is not defeated or diminished when fraud is held to toll the statute.

In his opinion, below, in the within action, Bryan, *D.J.*, enumerated the aforementioned reasons as supporting the proposition that fraud tolls the statute and acknowledged:

"The reasoning . . . is not unpersuasive." (R.6)

There is no doubt that the Court has the power to toll the statute of limitations in a Federal Employers' Liability Act action. The sole issue is whether and in what circumstances it will choose to exercise that power. In *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 585, 90 L.Ed. 743, a suit in equity was brought to enforce liability imposed on shareholders of a bank under Section 16 of the Federal Farm Loan Act. The bank had closed its doors in 1932 and suit was brought in 1943. Since the Federal Act had no statute of limitations, the state statute of ten years was applicable. The defendant urged the statute of limitations and laches. Mr. Justice Frankfurter, speaking for this Court, held:

"Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old Chancery Rule that where a plaintiff has been injured by fraud and 'remains in

ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey* v. *Glover*, 21 Wall (U. S.) 342, 348, 22 L.Ed. 636, 638; and see *Exploration Co.* v. *United States*, 247 U.S. 435, 62 L.Ed. 1200, 38 S.Ct. 571; *Sherwood* v. *Sutton*, (CC) 5 Mason 143, Fed. Cas. No. 12,782.

"This equitable doctrine is read into every federal statute of limitations."

Osbourne v. *United States*, CCA 2, 164 F. 2576, was cited by the District Court below to support its holding that fraud does not toll the statute of limitations in a Federal Employers' Liability Act. However, its particular facts and holding suggest the opposite. In *Osbourne*, plaintiff sued to recover for injuries sustained while a member of a crew. Plaintiff was interned by the Japanese on December 8, 1941. Prior thereto he had sustained an injury. Plaintiff was able to commence suit on July 31, 1946. The defendant raised the defense that the two-year statute of limitations under the Suits in Admiralty Act and the three-year statute of limitations under the Jones Act had expired. The Circuit Court of Appeals for the Second Circuit stated:

". . . All statutes of limitations are based on the assumption that one with a good cause of action will not delay bringing it for an unreasonable period of time; but when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed. Whatever the reasons for describing this type of statute of limitations as substantive rather than procedural--

and we suspect the chief reason was to move the period of limitation named in the statute, rather than that of the forum control in cases brought in state courts—we think we do the distinction no violence by holding that either type of statute will toll for one who is a prisoner of the enemy in time of war."

But if someone is a prisoner of the enemy in time of war and is held to be denied "access to the courts" it is the result of the intervening cause of a third party. A plaintiff who is misled as to his rights by a defendant's fraud is just as much "denied access to the courts." The reason for following the rule in *Osbourne* is then even more compelling since there is no intervening cause of a third party. The sole cause is the very act of the defendant itself and from this wrongful act it should not benefit.

While there are cases in other circuits that support the decision of the Second Circuit Court of Appeals in the instant case, *Damiano* v. *Pennsylvania R. Co.*, CCA 3, 161 F.2d 534, Cert. Denied, 322 U.S. 762; *Rohner* v. *Union Pacific Railroad Company*, CCA 10, 225 F.2d 272; *Bell* v. *Wabash Ry. Co.*, CCA 8, 58 F.2d 569; there are well-reasoned recent decisions to the contrary.

In *Scarborough* v. *Atlantic Coast Line R. Co.*, CCA 4, 178 F.2d 253, Cert. Den., 339 U.S. 919, 94 L.Ed. 1343, 70 S.C. 621, the defendant's claim agent told infant plaintiff's father that he could wait until the infant, a railroad employee, was 21 before settling his claim. When the infant reached his majority and suit was instituted, the defendant railroad raised the statute of limitations as a defense. Judge Dobie, speaking for a unanimous court, stated:

"And nothing is better settled, as a general principle, than the rule that wherever found and in whatever guise, fraud will, in some way or manner, never be

permitted to give an inequitable advantage to the one who has consciously perpetrated the fraud."

"The decisions in the Osbourne and Frabutt cases . . . show clearly that there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases decided, there is one exception (war), surely the infinite variety of human experience will disclose others."

"It has often been said that a primary purpose of statutes of limitations in general has been the prevention of fraud. It is freely conceded by appellee here that fraud will toll the running of the so-called remedial statute of limitations. We cannot see a distinction and a difference, so clear and so real, between the two classes of statutes of limitations—the remedial and the substantive—as to justify the courts in giving effect to fraud in tolling the statute in one type (remedial) and then flatly denying that effect to fraud in the other type (substantive). The ancient maxim that no one should profit by his own conscious wrong is too deeply imbedded in the framework of our law to be set aside by a legalistic distinction between the closely related types of statutes of limitations."

Judgment for defendant was reversed and remanded.

Supporting this view on remedial and substantive statutes of limitations is *63 Harvard Law Review 711*:

"Thus, judicial extension of federal limitations periods . . . would not seem to impinge on the Congressional purpose. Reappraisal of the validity of the distinction between the two types of limitations seems desirable."

In *Fravel* v. *Pennsylvania R. Co.*, U.S.D.C. D. Maryland, 104 F.Supp. 64, the court permitted suit after an eleven

year interval despite a general release. Plaintiff, a railroad employee, sustained a back injury in July, 1940. A few weeks later the defendant railroad obtained a release for $50.00 on the strength of a representation that nothing was wrong with his back and that if any injury showed up they would compensate him. In 1951 plaintiff instituted suit after he discovered he had sustained a herniated intervertebral disc. The defendant invoked the statute of limitations, but the Court citing *Scarborough* held:

> "The rule grants relief against misrepresentation of this sort relied upon by the persons to whom they are made, whether made with intent to defraud or not."

The defendant's motion to dismiss the complaint was denied.

POINT TWO

The Question of Whether the Representations of Defendant's Foreman, General Superintendent and Company Claim Agent to Plaintiff Were Sufficient to Toll the Statute of Limitations Is One of Fact to Be Determined at Trial.

In *Scarborough* v. *Atlantic Coastline R. Co.*, CCA 4, 202 F.2d 84, the Court set forth the rule as follows:

> "The issue should be squarely left to the jury under an instruction that if the claim agent, Smith, made the erroneous statement to the Plaintiff as to the statute of limitations, with the intention that Plaintiff would rely on the statement, and, if also, the Plaintiff actually relied on this statement, delaying the institution of suit by virtue of such reliance, then this would effectually toll the running of the statute of limitations. There is no occasion for the use of the word 'fraud' in this instruction."

This Court should not pass on this point until testimony has been taken at trial and the issues have been fully explored and determined by the Court and jury.

CONCLUSION

Judgment for Defendant on the Pleadings Should Be Reversed and the Plaintiff Should Be Permitted a Trial on the Merits, Including the Issue of Fraud or Misrepresentation.

Respectfully submitted,

JOHN J. SEFFERN
c/o Seymour Schwartz
Attorney for Petitioner
253 Broadway
New York 7, New York

DAVID SABLE, Esq.
Of Counsel

Office-Supreme Court, U.S.
FILED
JAN 10 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

RESPONDENT'S BRIEF

JOHN J. KENNELLY,
Attorney for Respondent,
116 John Street,
New York, N. Y.

WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO,
Of Counsel.

INDEX

	PAGE
Statement	1
Questions Presented	2
POINT I—The Statute of Limitations contained in the Federal Employers' Liability Act does not permit estoppel for fraud or misrepresentation by a defendant.	2
POINT II—Assuming that the Statute of Limitations contained in the Federal Employers' Liability Act allows an exception by estoppel, plaintiff has not alleged facts sufficient to establish such an estoppel.	13
Conclusion	15

TABLE OF CASES

Adams v. Albany, 80 F. Supp. 876 (D. C. Cal., 1948)	8
Adams v. Cameron, 95 Ala. 344, 10 So. 506, 507 (1892)	14
Ahern v. South Buff. R. Co., 303 N. Y. 545, 563 (1952); aff'd 344 U. S. 367 (1953)	8
Amy v. City of Watertown, 130 U. S. 320 (1889)	4
Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199 (1915)	7, 9
Bartlett v. Manor, 146 Ind. 621, 45 N. E. 1060 (1897)	4
Bauserman v. Blunt, 147 U. S. 647, 657 (1893)	4
Bell v. Wabash Ry. Co., 58 F. 2d 569 (8th Cir., 1932)	7
Bement v. Grand Rapids & I. Ry. Co., 194 Mich. 64, 160 N. W. 424 (1916)	6
Central Vermont Ry. Co. v. White, 238 U. S. 507 (1915)	7
Damiano v. Penn. R. Co., 161 F. 2d 534 (3rd Cir., 1947), cert. denied 332 U. S. 762 (1947)	8

PAGE

Frabutt v. N. Y., Chic. & St. Louis R. Co., 84 F. Supp. 460, 464 (D. C., Pa., 1949) 9
Fravel v. Pennsylvania R. Co., 104 F. Supp. 84 (D. C. Md., 1952) 9, 15

Gauthier v. Atchison, T. & S. F. R. Co., 176 Wis. 245, 186 N. W. 619 (1922) 7
Gillette v. Delaware, L. & W. R. Co., 91 N.J.L. 220, 102 Atl. 673 (1917) 7

The Harrisburg, 119 U. S. 199 (1886) 4
Hecht v. Malley, 265 U. S. 144, 153 (1923) 5
Hilliard v. Pennsylvania R. Co., 73 F. 2d 473 (6th Cir., 1934) 14

In the Matter of John J. Goff, Inc., 141 F. Supp. 862 (S. D. Maine, 1955) 8, 11

Luther v. Luther, 122 Ill. 558, 13 N. E. 166 (1887) ... 4

Morrison v. B. & O. R. Co., 40 App. D. C. 391 (1913) .. 6
Murray v. Chicago & N. W. Ry. Co., 92 Fed. 868 (8th Cir., 1899) 4
Mutual Life Ins. Co. of N. Y. v. Phinney, 178 U. S. 327, 342, 20 S. Ct. 906, 446 Ed. 1088 14

Omin v. Balt. & O. S. W. R. Co., 8 Ohio App. 161 (1917) 6
Osbourne v. United States, 164 F. 2d 767, 768 (2d Cir., 1947) (dicta) 8

P. C. & St. L. Ry. Co. v. Hine, 25 Ohio St. 629 (1874) . 4
Pollen v. Ford Instrument Co., 108 F. 2d 762 (2d Cir., 1940) 8

Scarborough v. Atlantic Coast Line R. Co., 178 F. 2d 253 (4th Cir., 1949) cert. denied 339 U. S. 919 (1950), 190 F. 2d 935 (1951); 202 F. 2d 84 (1953) 9, 15
Schroeder v. Young, 161 U. S. 334 (1895) 14, 15

PAGE

Sgambati v. United States, 172 F. 2d 297 (2d Cir., 1949) 9
Shunney v. Fuller Co., 111 F. Supp. 543 (D. C. Rhode Id., 1953) 14
Sontych v. Sharon Steel Corp., 73 F. Supp. 825 (D. C. Pa., 1947) 14
Sturm v. Broker, 150 U. S. 312, 336 (1893) 14

Taylor v. Coal Co., 94 N. C. 525 (1885) 4
Toran v. New York, N. H. & H. R. Co., 108 F. Supp. 564 (D. C., Mass.) 9, 15

United States v. Dawes, 151 F. 2d 639 (7th Cir., 1945), cert. denied 327 U. S. 788 (1946) 9
Upton v. Tribilock, 91 U. S. 45, 50 (1875) 14

Waugh v. Lennard, 69 Ariz. 214, 211 P. 2d 806 (1949) 15

Other Authorities

130 ALR 8, pp. 53-55 14
24 ALR 2d 1413, 1443 14
13 Am. & Eng. Enc. (1st ed.), pp. 689-690 4
19 Am. & Eng. Enc. (2nd ed.), pp. 150-151 4
McKinney's Workmen's Compensation Law, §§ 10, 11, 14 12
2 Roberts, Federal Liabilities of Carriers (2d ed., 1929), § 947, p. 1829, § 951, p. 1833, § 704, p. 1315 7, 10
2 Sutherland on Statutory Construction (3rd ed.), § 4510 ..... 5, 8
Thornton, Federal Employers' Liability and Safety Appliance Act (2d ed., 1912), § 114, pp. 173-174 7
31 U.S.C. § 235 11
45 U.S.C., § 55 11
45 U.S.C. § 56 1
49 U.S.C. § 16 (3) 11
1 Wood on Limitations of Actions (2nd ed.), pp. 1-2 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

RESPONDENT'S BRIEF

Statement

The petitioner commenced this action under the Federal Employers' Liability Act (45 U.S.C., §§ 51 *et seq.*) to recover damages for an industrial disease which, he alleged, he contracted as a result of his working under unsafe conditions created and maintained by his employer, the respondent. Petitioner brought this action some five years after the occurrence of the accident for which he sought damages. Respondent moved in the District Court to dismiss the complaint on the ground that petitioner did not commence his action within the time prescribed by the statute (45 U.S.C., § 56). Petitioner opposed this motion arguing that Paragraph nine (9) of his complaint alleged facts sufficient, if proved at the trial, to estop re-

spondent from interposing the limitation of time in the Act. Paragraph nine (9) states:

> "9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time." (R. 1).

The District Court granted respondent's motion and dismissed the petitioner's complaint. The United States Court of Apeals for the Second Circuit, in a *per curiam* opinion, unanimously affirmed the dismissal (R. 7-9).

This Court granted certiorari on October 13, 1958 (R. 10).

Questions Presented

The questions presented by this appeal are two:

1. Whether the period of limitations contained in Section 6 of the Federal Employers' Liability Act can be extended by reason of fraud or misrepresentation by the defendant inducing a prejudicial delay by the plaintiff;

2. Assuming the answer to the first question to be in the affirmative, whether the representations allegedly made in this case were sufficient to create such an estoppel.

POINT I

The statute of limitations contained in the Federal Employers' Liability Act does not permit estoppel for fraud or misrepresentation by a defendant.

In the fifty years that followed the enactment of the Federal Employers' Liability Act many state and fed-

eral courts passed on the precise question at bar and questions integrally related to it. The vast majority of the decisions of these courts support the conclusion reached below that the statute of limitations here cannot be tolled by the defendant's fraud or misrepresentation. It is inescapably significant that in the forty years immediately following the enactment of the Federal Employers' Liability Act no court held otherwise. Three contrary cases have been reported. The first of them was not decided until 1949. These three decisions, the respondent urges, are contrary not only to the overwhelming and historic weight of authority, but they reach a result which demonstrably the Congress did not intend when it enacted the Federal Employers' Liability Act. The judicial history that preceded the adoption of the Federal Employers' Liability Act in 1908, the language of the Act itself, and the subsequent cases, all point ineluctably to the conclusion that the period of limitation under consideration was designed as an unavoidable condition of the right created by the Act, a condition that could neither be waived nor forfeited.

Long before 1908 there was recognized in the law a distinction between ordinary statutes of limitations and limitations prescribed in statutes which created a new right and liability. In the latter instance, time was deemed to have been made an integral part of the right created and an indispensable condition to its availability. A lapse of the prescribed period was held to operate as a total extinguishment of the right. As to such limitations, the rules of law governing general statutes applicable to classes of actions had no effect. Unlike the ordinary or general periods of limitations, those which were part of a statute creating a new right were held to be immune from the disabilities and extenuations through which the efficacy of ordinary statutes of limitations might be avoided. Even proof of fraud inducing delay would not suffice to prevent operation of the bar.

See e.g.:

Bartlett v. *Manor*, 146 Ind. 621, 45 N. E. 1060 (1897);
Luther v. *Luther*, 122 Ill. 558, 13 N. E. 166 (1887);
Taylor v. *Coal Co.*, 94 N. C. 525 (1885);
13 Am. & Eng. Enc. (1st ed.), pp. 689-690;
19 Am. & Eng. Enc. (2nd ed.), pp. 150-151;
1 Wood on Limitations of Actions (2nd ed.), pp. 1-2.

Cf.:

The Harrisburg, 119 U. S. 199 (1886);
P. C. & St. L. Ry. Co. v. *Hine*, 25 Ohio St. 629 (1874).

In the 19th century the courts at first evidenced a marked aversion to the enforcement of limitations of time created by statute. By the beginning of the 20th century the courts —particularly the federal courts—had overcome their pristine aversion to these limitations. With the advent of the 1900s, the courts began to see in these different statutes of limitations a general usefulness that more than outweighed the occasional hardships inflicted by their rigid application. There followed generally in the United States a judicial course of strict adherence to legislative time limitations. Only those exceptions specified in the statutes themselves were honored by the courts. Where the Statute of Limitations made no exception, the courts held themselves powerless to supply one.

Murray v. *Chicago & N. W. Ry. Co.*, 92 Fed. 868 (8th C., 1899);
Amy v. *City of Watertown*, 130 U. S. 320 (1889);
Bauserman v. *Blunt*, 147 U. S. 647, 657 (1893);
Wood, Limitations of Actions (4th ed.), §§ 4 n. 30 at pages 7-10; 11b at page 55.

This was all familiar law when the Congress had before it for consideration the enactment of the Federal Employers' Liability Act. Quite apart from the question of the wisdom of this body of law, its existence has an obvious significance in the case at bar. Plainly the law prevailing at the time this legislation was enacted by Congress is a valuable if not indispensable aid in the construction of the Act. Both as a matter of logic and construction, the Act of 1908 must be interpreted on the premise that the Congress was aware of this body of law and took it into consideration when it enacted this legislation.

2 Sutherland on Statutory Construction (3rd ed.), § 4510.

See:

Hecht v. *Malley*, 265 U. S. 144, 153 (1923).

Thus, when Congress provided in Section 6 of the Act that:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." (April 22, 1908, c. 149, § 6, 35 Stat. 66)

and made no exception, it must have realized—and consequently intended—that as a statute of limitations conjoined to a newly created statutory right, it would be construed as an exceptionless and indispensable condition of liability.

It was not long before these expectations were fulfilled. Both the state and federal courts held that the period of limitation was a condition of the new right created by the Act and could not be evaded by a showing of disability or fraud. The rationale offered was the same one found in the early cases which preceded the Act's adoption. Thus, in one of the first cases to construe Section 6 of the Act

(*Bement v. Grand Rapids & I. Ry. Co.*, 194 Mich. 64, 160 N. W. 424 (1916)), it was said:

> "A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of the rights of action existing under other statutes or under the common law. In the former the limitation of time is a limitation of the right, and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that under such general statutes of limitations the defendant may be estopped from the benefit of the statute by an agreement waiving it, or by concealment or by fraud. The statute here in question creates a new liability, and takes away defenses formerly available, and the right of action therein created is conditioned upon its enforcement within a prescribed period. The action not having been brought within such period designated by the statute, it is lost. . . ." (*Bement, supra*, at p. 425).

It was held, accordingly, that alleged fraudulent representations by the defendant which induced plaintiff to forebear suit until the statute had run could not create an estoppel.

Similar statements appear in most of the early cases construing Section 6. All of them held as did the *Bement* case.

See e.g.

Morrison v. *B. & O. R. Co.*, 40 App. D. C. 391 (1913);

Omin v. *Balt. & O. S. W. R. Co.*, 8 Ohio App. 161 (1917);

Gillette v. *Delaware, L. & W. R. Co.*, 91 N.J.L. 220, 102 Atl. 673 (1917);

Gauthier v. *Atchison, T. & S. F. R. Co.*, 176 Wis. 245, 186 N. W. 619 (1922);

Bell v. *Wabash Ry. Co.*, 58 F. 2d 569 (8th Cir. 1932);

Thornton, Federal Employers' Liability and Safety Appliance Act (2d ed., 1912), § 114, pp. 173-174;

2 Roberts, Federal Liabilities of Carriers (2d ed., 1929), § 947, p. 1829; § 951, p. 1833;

Cf.:

Central Vermont Ry. Co. v. *White*, 238 U. S. 507 (1915).

Atlantic Coast Line R. R. v. *Burnette*, 239 U. S. 199 (1915).

By 1939 the judicial construction given Section 6 was consistent, uniform and unmistakable. Without exception, in each case where the question of the statute of limitation's susceptibility to estoppel or avoidance because of disability was raised, it was decided that the period was an absolute condition to the right, impervious to exception. In 1939 the section was subjected to formal scrutiny by the Congress in connection with the proposed amendment of so much of the section as dealt with the period of limitations. The result of Congress' deliberations was an enlargement of the period from 2 to 3 years (53 Stat. 1404; Aug. 11, 1939). Significantly, no other change was made insofar as the period of limitations was concerned.

As urged by the respondent earlier in its brief, it must be reasoned that at the time of the amendment the Congress had in mind the judicial construction given the section before 1939. Thus, it must be clear that had Congress not been satisfied with the state of the law as it then was, it would have been a relatively simple thing to change it

by the insertion of an express exception.[1] Its acquiescence belies dissatisfaction and shows that the construction given by the courts was precisely the one intended by the Congress. This, of course, would be so even if the decisions prior to 1908 had not been cast in the same mold.

See:

2 Sutherland, *supra;*
In the Matter of John J. Goff, Inc., 141 F. Supp. 862 (S. D. Maine, 1955).

In the decade that followed the 1939 amendment the courts continued to construe the statute as it had been construed in the prior 30 years: there could be no estoppel against use of the statute of limitations because of fraud or misrepresentation.

Damiano v. *Penn. R. Co.*, 161 F. 2d 534 (3rd Cir., 1947), cert. denied 332 U. S. 762 (1947);
Osbourne v. *United States*, 164 F. 2d 767, 768 (2d Cir., 1947) (dicta);
Ahern v. *South Buff. R. Co.*, 303 N. Y. 545, 563 (1952); aff'd 344 U. S. 367 (1953).

See:

Pollen v. *Ford Instrument Co.*, 108 F. 2d 762 (2d Cir. 1940);
Adams v. *Albany*, 80 F. Supp. 876 (D. C. Cal., 1948);

---

[1] It might profitably be noted at this point that even before 1908 Congress, in at least one case, had made good use of its obvious and convenient power to make exceptions to a statute of limitations. Thus, in a custom law enacted in 1874 Congress had created an action for forfeiture of property under certain circumstances. The creative statute contained a 3 year limitations period. Had nothing more been said this limitation would have been construed as an indispensable condition to the right regardless of fraud or concealment of the property. Because it was intended that fraud should toll the period of limitations express provision to that effect was made (Act June 22, 1874, c. 391, § 22, 18 Stat. 190).

United States v. *Dawes*, 151 F. 2d 639 (7th Cir., 1945), cert. denied 327 U. S. 788 (1946); *Sgambati* v. *United States*, 172 F. 2d 297 (2d Cir., 1949).

No effort was ever made by the Congress to obviate the impact of these cases. This omission confirms the conclusion that no other result was ever intended or desired.

Three cases, all of comparatively recent vintage, are contrary to the accumulated decisions of the first forty years under the Act. The first of these was *Scarborough* v. *Atlantic Coast Line R. Co.* (178 F. 2d 253 (4th Cir., 1949), cert. denied 339 U. S. 919 (1950); 190 F. 2d 935 (1951); 202 F. 2d 84 (1953)). The second, *Fravel* v. *Pennsylvania R. Co* (104 F. Supp. 84 (D. C. Md., 1952)) was controlled by the earlier *Scarborough* case decided by the Court of Appeals of the same (4th) Circuit. The last, *Toran* v. *New York, N. H. & H. R. Co.* (108 F. Supp. 564 (1952)), was decided seven years ago in a Massachusetts District Court.

The bases upon which these three decisions rest are fairly and neatly summarized in Judge Bryan's opinion below (R. 5-6). These bases are, singly and in combination, highly vulnerable. Thus, the contention that the Federal Employers' Liability Act did not create a new cause of action unknown to the common law is plainly erroneous.

> "There is no question, that the Federal Employers' Liability Act created a cause of action unknown to the common law."
>
> *Frabutt* v. *N. Y., Chic. & St. Louis R. Co.*, 84 F. Supp. 460, 464 (D. C., Pa., 1949).

Mr. Justice Holmes put this question to rest just a short time after the Act's passage. In *Atlantic Coast Line R. R.* v. *Burnette* (*supra* at p. 201), he said, in speaking of the Act:

> "At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source."

Before the enactment of 1908 the law controlling the liability of railroad companies engaged in interstate commerce to their employees depended upon the diverse statutes and decisions of the various states. Each accident was governed by the particular law of the state in which it occurred.

> "From this babel of judicial voices with its consequent glaring inequities and inequalities, came the national act, declaring one rule of liability throughout the nation and with it, as a necessary concomitant, the decisions of the national courts, construing the act in all its parts, became binding upon all state courts. The fellow-servant doctrine was abolished; something akin to comparative negligence was substituted for contributory negligence; assumption of risk in certain cases was abolished; contracts for a consideration of indemnity waiving the right to sue were declared void and the principle of compensation as a substitute for penalties in the way of damages which regulated recoveries in certain states was adopted."
>
> Roberts, Federal Liabilities of Carriers, *supra*, § 704 at page 1315.

In short, the Federal Employers' Liability Act created a new right.

Much of the opinion in the *Toran* case proceeds on the theory that it would not have been repugnant to the demonstrated purpose of the Act for Congress to have permitted an equitable estoppel exception to the period of lim-

itations. The short answer to that contention is that Congress could have accomplished that result, if desired, by the simple expedient of an express exception at any time during the past 50 years. It has not done so.

Congress, it must be presumed, was aware of the state of pertinent judicial decisions before the enactment of the Federal Employers' Liability Act and the body of pertinent law that followed its enactment in the subsequent years (*In the Matter of John S. Goff, Inc., supra*). The failure of Congress to provide an exception, first in the enactment and later in the amendment of the Act, is a formidable expression of Congressional satisfaction with the unanimous judicial opinion on this question.

Nor can it be persuasively argued that Section 5 of the Act permits such an estoppel. That section provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be *void*. . . ." (45 U.S.C., § 53) (Emphasis supplied).

It is clear from the nature of the sanction provided in this section that it contemplated agreements, releases from liability and the like whose purported effect was to bind the employee in a contractual sense. Thus, the provision that such devices are to be deemed "void." Clearly, there is nothing of a contractual or similar nature in the conduct asserted by petitioner to be creative of an estoppel in this case.

The suggestion that the addition of the words "and not after" to the limitations contained in the Interstate Commerce Act (49 U.S.C., § 16 (3)) and the Informer's Act (31 U.S.C., § 235) accounts for the fact that in those instances the limitations are held not only to bar the remedy but also to destroy the liability is hardly persuasive.

Those three words have no talismanic effect. As a matter of pure semantics they would add nothing to the plain injunction already contained in the Act's statute of limitations. Certainly, a literate Congress could be expected to produce a more imaginative linguistic distinction between statutes that were intended to be so basically and substantially different.

Finally, it is inaccurate to conclude from the fact that the period of limitations in the Federal Employers' Liability Act is an absolute one that therefore the rights under the Act are less favorable to a defrauded employee than those given him by the common law. Even if it can be assumed that the construction put upon the limitation provision by the courts below was a less liberal one than would have obtained in most of the states at common-law, that provision is only one aspect of the new right created by the Act. In all other regards the statute heaps upon the employee benefits and advantages not his at common law. It does not seem unreasonable that a Congress which had given so much to the employee in the form of a new right might exact in return, to the benefit of the employer, some part of the rights formerly held by the employee.[2]

---

[2] Compare New York's Workmen's Compensation Law. This act created a substantial new right in favor of the employee, an action against the employer for all damages caused by "on the job" accidents whether resulting from the negligence of the employer or without any fault on his part. In return, however, as a sort of compromise, it took from the employee his traditional action in negligence against his employer for such accidents and limited the recoverable awards to figures considerably less than might have been obtained in common law actions. (See McKinney's Workmen's Compensation Law, §§ 10, 11, 14.)

POINT II

Assuming that the statute of limitations contained in the Federal Employers' Liability Act allows an exception by estoppel, plaintiff has not alleged facts sufficient to establish such an estoppel.

Should this Court find that the statute of limitations in the Federal Employers' Liability Act may be tolled by the application of equitable estoppel, the present action was nonetheless properly dismissed. Even where the doctrine of equitable estoppel may be invoked to postpone or extend a statute of limitations, the doctrine does not apply unless the traditional elements of estoppel are in the case. A primary and indispensable element is a *justifiable* reliance by the plaintiff upon the representations made by the defendant. Historically, as a general rule, there is no justification for a reliance upon a misrepresentation of *law* made by a defendant. And that is all the petitioner alleges here in attempted avoidance of the limitation.

> "Subsequent thereto defendant's agents, servants and employees fraudulently or intentionally misstated to plaintiff *that he had seven years within which to bring an action against said defendant* . . ." (R. 1) (emphasis supplied)

Petitioner was fully aware of the facts and circumstances of his accident. The representation allegedly made to him by respondent's employees were opinions as to a matter of law, the length and operation of the statute of limitations. Petitioner was free to—and prudence dictated that he should—see an attorney as to the law surrounding his claim. The failure to do so and the reckless reliance upon what on this pleading may even have been the innocently erroneous opinion of an unqualified layman, takes him without the scope of the estoppel exception.

It would appear that the District Judge below shared this opinion. He did not pass on the question, however, because of the determination that under no circumstances could there be an exception based on estoppel (R. 6). The case he cited, *Hilliard* v. *Pennsylvania R. Co.* (73 F. 2d 473 (6th Cir., 1934)), is in point. There, defendant's claim agent had stated to the infant plaintiff's father shortly after the accident that "when the boy gets to be twenty-one years old he can determine for himself whether he will file a lawsuit or not." The Court said:

> "This statement did not amount to an express promise or agreement not to rely upon the statutes, as in *Schroeder* v. *Young*, 161 U. S. 334, 16 S. Ct. 512, 516, 40 L. ed. 721. In our view, it was but an expression of the opinion of the claims adjuster as to a matter of law. Nothing appears in the record to indicate that he was an expert in the laws of limitation or that the facts were not as well known to the father as to him. Each of the parties was chargeable with knowledge of the law. *Mutual Life Ins. Co. of N. Y.* v. *Phinney*, 178 U. S. 327, 342, 20 S. Ct. 906, 446 Ed. 1088. The expression by the claims adjuster of his opinion as to the law, in such circumstances, cannot therefore, operate as an estoppel . . ." (73 F. 2d 473, 475-476).

Also:

Shunney v. *Fuller Co.*, 111 F. Supp. 543 (D. C. Rhode Id., 1953);
Upton v. *Tribilock*, 91 U. S. 45, 50 (1875);
Sturm v. *Broker*, 150 U. S. 312, 336 (1893);
Adams v. *Cameron*, 95 Ala. 344, 10 So. 506, 507 (1892);
Sontcvh v. *Sharon Steel Corp.*, 73 F. Supp. 825 (D. C. Pa., 1947);
n 130 ALR 8, 53-55;
n 24 ALR 2d 1413, 1443.

See:

Waugh v. *Lennard*, 69 Ariz. 214, 211 P. 2d 806 (1949).

Nothing in the *Scarborough*, *Fravel* or *Toran* cases calls for a different result. In *Toran* the representation alleged was not specified. In *Scarsborough* and *Fravel* there were promises to pay on the part of the defendant which brought those cases within the scope of the case of *Schroeder* v. *Young* (161 U. S. 334 (1895), cited in the quotation from *Hilliard* v. *Penn. R. Co., supra*)). Here there was no assurance or promise by respondent that it would pay the award if petitioner delayed; there was only the mistaken opinion on a matter of law. That was insufficient to create an estoppel.

CONCLUSION

The judgment for defendant dismissing the complaint should be affirmed.

Respectfully submitted,

JOHN J. KENNELLY,
Attorney for Respondent,
116 John Street,
New York, N. Y.

WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO,
Of Counsel.